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No. 94-1685

In the Supreme Court of the United States

OCTOBER TERM, 1994

KERR-MCGEE COAL CORPORATION, PETITIONER

v.

ROBERT B. REICH, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Section 103(f) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 813(f), provides that, subject to regulations issued by the Secretary of Labor, a representative of miners can accompany the Secretary or his authorized representative during a mine inspection. The Secretary's regulations (30 C.F.R. 40.1(b)(1)) permit "[a]ny person or organization which represents two or more miners" to exercise this "walkaround" right, and the Secretary has construed the statute and regulations to mean that a labor organization may serve as a miners' representative, regardless of whether it also represents the miners for collective bargaining purposes under the National Labor Relations Act. The question presented is whether the court of appeals correctly held that the Secretary's interpretation is reasonable.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-21) is reported at 40 F.3d 1257. The decisions of the Federal Mine Safety and Health Review Commission (Pet. App. 22-43) and the administrative law judge (Pet. App. 44-70) are reported at 15 F.M.S.H.R.C. 352 and 13 F.M.S.H.R.C. 1889, respectively.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1994. A petition for rehearing was denied on January 17, 1995. Pet. App. 71-72. The petition for a writ of certiorari was filed on April 14, 1995.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress enacted the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*, "to protect the health and safety of the Nation's coal or other miners." 30 U.S.C. 801(g). The Secretary of Labor has "broad authority * * * to promulgate regulations governing the mining industry and to investigate and remedy safety concerns." Pet. App. 3. He enforces the Act through the Mine Safety and Health Administration (MSHA). 29 U.S.C. 557a.

The Act directs the Secretary to conduct "frequent inspections" of mines. 30 U.S.C. 813(a); see *Thunder Basin Coal Co.* v. *Reich*, 114 S. Ct. 771, 774 (1994). If the Secretary finds a violation of the Act or of a health or safety standard, rule, or order, he must issue a citation specifying a reasonable time in which to abate the violation. 30 U.S.C. 814(a). In certain circumstances, the Secretary must also order the operator to withdraw all persons from the affected area until the violation is abated. 30 U.S.C. 814(b) and (d)-(g), 817(a) and (b). For each cited violation, the Secretary must propose the assessment of a civil penalty of up to $50,000. 30 U.S.C. 815(a), 820(a) (Supp. V 1993). If an operator fails to correct the violation, the Secretary may propose a daily penalty of up to $5,000 until it is abated. 30 U.S.C. 815(b), 820(b) (Supp. V 1993); *Thunder Basin*, 114 S. Ct. at 775 & n.4. Each order, citation, notice or decision must be "immediately posted" by the operator at the mine. 30 U.S.C. 819(a).

A mine operator may contest a citation or withdrawal order by seeking a hearing before the Federal Mine Safety and Health Review Commission, an independent adjudicatory agency. See 30 U.S.C. 815(d), 823. An administrative law judge (ALJ) performs the first level of such review. 30 U.S.C. 823(d)(1). Any party "adversely affected or aggrieved" by the ALJ's decision may seek discretionary review by the Commission, 30 U.S.C. 823(d)(2)(A)(i), followed by review in the appropriate court of appeals, 30 U.S.C. 816(a)(1); see *Thunder Basin*, 114 S. Ct. at 776-777.

b. The Mine Act provides that, subject to regulations promulgated by the Secretary, "a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his * * * representative" during mine inspections. 30 U.S.C. 813(f). This "walkaround" right is "for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine." *Ibid.* In addition, miners' representatives "may obtain certain health and safety information and promote health and safety enforcement." *Thunder Basin*, 114 S. Ct. at 774 (footnote omitted) (citing 30 U.S.C. 813(c), 813(g)(1) and (2), 815(d), 817(e)(1), 819(b); 30 C.F.R. 44.3, 48.3, 48.23, 75.220, 77.1101, 77.1713); see also Pet. App. 4 n.5.

The Secretary has promulgated regulations governing the selection of miners' representatives. See 30 C.F.R. Pt. 40 (Pet. App. 74-78); 43 Fed. Reg. 29,509 (1978). The regulations define a "[r]epresentative of miners" as "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. 40.1(b)(1). A

representative must file certain information with MSHA concerning his or her identity and designation, and must provide a copy of that information to the mine operator. 30 C.F.R. 40.2, 40.3. The operator must, in turn, post that information at the mine. 30 C.F.R. 40.4; see *Thunder Basin*, 114 S. Ct. at 774-775.

2. Petitioner operates the Jacobs Ranch Mine, a surface coal mine in Wyoming. In July 1990, seven of its miners designated the United Mine Workers of America (UMWA) and two UMWA employees as their representatives under Section 103(f) of the Act, 30 U.S.C. 813(f). Neither the UMWA nor any other labor organization represents petitioner's miners for purposes of collective bargaining under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* Pet. App. 7, 24. The UMWA mailed the requisite designation forms to MSHA and petitioner. When petitioner refused to post the forms, an MSHA inspector issued a citation for violation of 30 C.F.R. 40.4, followed by a failure-to-abate order. After daily fines were proposed, petitioner posted the notice, and it contested the citation and order. Pet. App. 6-7, 24-27, 51-54.

3. An ALJ sustained the citation and assessed a penalty of $300. Pet. App. 44-70. The ALJ noted that the Mine Act and the regulations under it impose no restrictions on who may become a miners' representative. *Id.* at 61. In light of the different purposes of a "representative" under the NLRA and the Mine Act, the ALJ "f[ou]nd merit in MSHA's position that there is no conflict between the Mine Safety and Health Act and the [NLRA] in their application here," and "no merit" in petitioner's argument that it was not legally required to recognize the UMWA as the miners' walkaround representative under the

Mine Act because the UMWA was not the miners' collective bargaining representative under the NLRA. *Id.* at 62, 68.[1]

4. The Commission affirmed. Pet. App. 22-43. It reiterated its holding in *Emery Mining Corp.* v. *Secretary of Labor*, 10 F.M.S.H.R.C. 276 (1988), aff'd *sub nom. Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) (*UP&L*), that a nonemployee may become a miners' representative under Section 103(f) because that provision "imposes no employee-status limitation as to whom [miners] may choose." Pet. App. 37. The Commission "discern[ed] no basis" for limiting union representatives to those "that also represent[] the miners for collective bargaining purposes." *Id.* at 38. It agreed with the Secretary that a representative's conduct "during a walkaround * * *, rather than [his] motivation[,] * * * must be examined to determine whether there has been abuse," *id.* at 39-40, and determined that any concerns about possible abuse here were purely "speculative" and could be

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[1] The ALJ reasoned that "[u]nder the [NLRA], a representative is elected by a majority of the workers * * * to present the needs of the employees to the employer, concerning terms and conditions of employment," while under the Mine Act, "a representative can be chosen by only two or more miners * * * solely for the purpose of accompanying the mine inspector during his inspection." Pet. App. 62-63. The ALJ continued (*id.* at 63 n.9): "MSHA seeks a representative of miners * * * to point out any problems that miners may have noticed. The representative remains with the inspector during the investigation and his only allowed activity is that of advising and observing the mine inspector. Should the representative engage in any other activity, he will be asked to leave and another representative will join the inspector."

"addressed on an individual basis" when and if they occurred, *id.* at 40.

The Commission noted that the Secretary, in promulgating the regulations, had concluded that it would be inappropriate to incorporate "the concept of collective bargaining representation under the NLRA" into Section 103(f) of the Mine Act. Pet. App. 40. The Commission agreed, explaining that the different purposes of the two Acts—the NLRA's "broad[] guarantees" with respect to collective bargaining generally, and the Mine Act's "pervasive[] regulat[ion] [of] the safety and health of employees in one industry"—rendered NLRA restrictions on nonemployee access to the workplace "inapplicable" to the Mine Act. *Id.* at 40-41. For that reason, the court concluded, this Court's decision in *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527 (1992), which "was concerned with 'the relationship between the rights of employees under § 7 of the [NLRA] * * * and the private property rights of employers,'" Pet. App. 41-42 (quoting 502 U.S. at 529), did not affect the right of miners to choose a nonemployee union agent as a walkaround representative under the Mine Act, which "entails pervasive regulation and a diminished expectation of full enjoyment of private property rights," Pet. App. 42 (citing *Donovan* v. *Dewey*, 452 U.S. 594, 603 (1981)).

5. The court of appeals affirmed, Pet. App. 1-21, holding that in light of the Act's "broad grant of authority to the Secretary," his interpretation of Section 103(f) is reasonable. *Id.* at 2-3, 9. The court first observed that under the Secretary's regulation, see 30 C.F.R. 40.1(b)(1), "organizations" may serve as representatives. Pet. App. 10. It also noted that the Secretary, in the regulatory preamble, had clearly

rejected the NLRA definition of "representative." *Ibid.* (citing 43 Fed. Reg. 29,508 (1978)). The court therefore concluded that the Secretary's interpretation of his own regulations is reasonable. Pet. App. 10.

The court also found no support in the Act itself for limiting representative status in the manner petitioner urged. Examining Section 103(f)'s guarantee of continued compensation to a "representative of miners who is also an employee of the operator," 30 U.S.C. 813(f), the court agreed with the Tenth Circuit that "[b]y creating a subclass of representatives who are entitled to compensation while exercising walkaround rights * * *, Congress clearly recognized that some miners' representatives may be employees of the operator and some may not." Pet. App. 11 (quoting *UP&L*, 897 F.2d at 450).

Petitioner's narrow construction of the Act "fare[d] no better" under the legislative history, in which the court found no indication that Congress regarded third-party participation as inconsistent with the Mine Act's goals of miner education and participation. Pet. App. 12. On the contrary, the conference report on the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), Pub. L. No. 91-173, 83 Stat. 742, stated that the term "representative" included organizations that did not represent miners "under other labor laws." Pet. App. 13 n.10 (quoting H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 67 (1969)). In light of Congress's choice not to alter the statutory text or to express a contrary intent in the current Act, and Congress's "clear concern about miners' safety," the court found the Secretary's interpretation consistent with the Act's objectives. Pet. App. 13. The court

noted the benefit to miners of permitting non-employees to serve as walkaround representatives, including their expertise and their freedom from employer reprisal. *Ibid.*

The court also rejected petitioner's claim that the mere potential for abuse made the UMWA's motive in achieving walkaround status a *per se* abuse of the Mine Act. Like the Tenth Circuit in *UP&L*, 897 F.2d at 452, the court concluded that an operator should respond to individual instances of abuse "when it discovers them," and that a union that "actually misused" its statutory authority would forfeit "its right to serve as a miners' representative." Pet. App. 14-15 & n.12.

Finally, the court held that petitioner's reliance on *Lechmere* was misplaced. Pet. App. 3, 16. First, it reasoned that the balance struck by the Court in *Lechmere* between the property rights of employers and the access rights of third parties had no application to the Mine Act, in which Congress itself had granted specific rights to third parties and had therefore already "conducted the balancing." *Id.* at 18. Second, unlike in *Lechmere*, no prior decision of this Court limited the agency's discretion to adopt the challenged interpretation; indeed, in *Thunder Basin*, which involved the regulations at issue here, the Court had observed that "Congress' interest in regulating the mining industry may justify limiting the private property interests of mine operators." Pet. App. 18 n.16 (quoting 114 S. Ct. at 781 n.21). Third, because the property rights of employers derive "from state common law," not the NLRA, the court concluded that the Secretary had not ignored NLRA policies in allowing the UMWA to serve as a miners' representative under the Mine Act here. Pet.

App. 18 (quoting *Thunder Basin*, 114 S. Ct. at 781 n.21).

Judge Sentelle concurred. Pet. App. 19-21. He emphasized that the court had addressed only the Secretary's interpretation of the Mine Act. Because the parties had not challenged the constitutionality of the Act as construed by the Secretary, Judge Sentelle noted, that question was not addressed in the court of appeals' opinion. *Id.* at 20-21.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is not warranted.

1. This case presents a single question of statutory interpretation (see Pet. i): whether the Secretary has reasonably construed Section 103(f) of the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 813(f), to allow a union to serve as a miners' representative where it is not also the miners' collective bargaining representative under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.* Section 103(f) authorizes "a representative of the operator and a representative authorized by his miners" to accompany the Secretary during a mine inspection, 30 U.S.C. 813(f), and the implementing regulation, 30 C.F.R. 40.1(b)(1), permits "[a]ny person or organization which represents two or more miners" to serve as the representative.

Because Section 103(f) imposes no limitations on who may become a miners' representative, the Secretary's determination that a union authorized by two or more miners at a nonunion mine may exercise the miners' walkaround rights fully accords with the

text of the Mine Act, as well as its "broad safety-forcing goals." *Emerald Mines Co.* v. *FMSHRC*, 863 F.2d 51, 53 (D.C. Cir. 1988). By contrast, petitioner's contention (Pet. 18) that Section 103(f) "is best read to mean [that only] one of the miners themselves or the miners' certified collective bargaining representative" may serve as a walkaround representative reads a limitation into the Act that nowhere exists and that disserves the safety interests of miners. The Secretary's construction therefore was properly sustained by the court below under the principles of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

Indeed, the only two courts of appeals that have addressed the question have concluded that Section 103(f) imposes no "limitation on the employment status of the [miners'] representative." Pet. App. 12 (emphasis omitted) (quoting *Utah Power & Light Co.* v. *Secretary of Labor*, 897 F.2d 447, 450 (10th Cir. 1990) (*UP&L*)).[2] Although the issue in *UP&L* was

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[2] The court below upheld (Pet. App. 10) the Secretary's interpretation of 30 C.F.R. 40.1(b)(1) as permitting, without qualification, two or more miners to select an organization as their walkaround representative. The court observed (Pet. App. 10 (citing 43 Fed. Reg. 29,508 (1978)) that in promulgating the regulation, the Secretary "expressly consider[ed] and reject[ed] the notion that miners' representatives must be selected by a majority of miners," as under the NLRA. Petitioner does not challenge the Secretary's interpretation of his own regulation. Instead, petitioner asserts (Pet. 10 n.3) that the court misunderstood the phrase "his miners" in Section 103(f) to refer to the representative's, rather than the operator's, miners. There is no reason to believe, however, that the court was confused about the antecedent of "his" in Section 103(f), much less that its analysis hinged upon such a reading.

whether nonemployee union agents could serve as miners' representatives at a mine where the union was the collective bargaining agent under the NLRA, the court placed no reliance on that fact in upholding the designation, but instead reasoned that the broad language of Section 103(f) is "dispositive" of the issue. 897 F.2d at 450.[3] Accord *Council of S. Mountains, Inc.* v. *FMSHRC*, 751 F.2d 1418, 1421 n.18 (D.C. Cir. 1985) ("The Mine Act * * * does not articulate any distinction between the rights of employee and nonemployee representatives."); *Secretary of Labor on Behalf of Truex* v. *Consolidation Coal Co.*, 8 F.M.S.H.R.C. 1293, 1298 (1986). Moreover, both the court below and the Tenth Circuit correctly determined that Section 103(f)'s guaranty of "no loss of pay" during an inspection for a miners' representative "who is also an employee of the operator" "creat[es] a subclass of representatives who are entitled to compensation," and reveals Congress's "clear[] recogni[tion]" that both employees and nonemployees would serve as representatives. Pet. App. 11 (quoting *UP&L*, 897 F.2d at 450). Thus, there is no circuit conflict on the sole question presented.

2. a. The Secretary's interpretation of Section 103(f) accords with the Mine Act's overriding purpose of protecting the health and safety of miners. *Thunder Basin Coal Co.* v. *Reich*, 114 S. Ct. 771, 774 (1994); 30 U.S.C. 801(g). The Act represents Congress's response to the "notorious history" of health and safety problems in the mine industry.

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[3] In *Thunder Basin Coal Co.* v. *FMSHRC*, No. 94-9563, the Tenth Circuit currently has before it the precise question presented by this case under essentially identical circumstances.

Donovan v. *Dewey*, 452 U.S. 594, 603 (1981); see *United Mine Workers* v. *FMSHRC*, 671 F.2d 615, 626 n.42 (D.C. Cir.), cert. denied, 459 U.S. 927 (1982); 123 Cong. Rec. 4387 (1977) (remarks of Sen. Williams). To accomplish its purpose, the Act imposes "pervasive and defined" regulation on mine operators, including provisions for warrantless and unannounced inspections, *Dewey*, 452 U.S. at 603; grants "broad authority" to the Secretary "to compel * * * compliance," *Thunder Basin*, 114 S. Ct. at 775; and contemplates the "active" participation of "miners and their representatives," *Council of S. Mountains*, 751 F.2d at 1420 (citing S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977)); see also Pet. App. 13; *UP&L*, 897 F.2d at 451 & n.2; *Magma Copper Co.* v. *Secretary of Labor*, 645 F.2d 694, 698 (9th Cir.), cert. denied, 454 U.S. 940 (1981).

The Secretary has consistently recognized that the Act's "safety-forcing" goal, *Emerald Mines*, 863 F.2d at 58, is best served by encouraging all miners, through their representatives, to exercise their statutory rights. See *UP&L*, 897 F.2d at 452. For example, the Secretary has construed Section 103(f) since its enactment to permit two or more miners to designate nonemployee representatives, rather than to restrict them to a lone majority representative. As the Secretary recognized in the regulatory preamble, 43 Fed. Reg. 29,508 (1978), "[t]he purposes of the Mine Act are better served by allowing multiple representatives" at each mine, thereby guaranteeing "that all miners have the opportunity to exercise their

right to select the representative of their choice" for purposes authorized by the Act.[4]

The miners in this case who designated the UMWA as their representative availed themselves of the union's ability to "contribute to an inspection in ways that miners themselves cannot," either through the representatives' greater safety and health expertise or greater immunity from "the threat of pressure from the employer." Pet. App. 13; see *id.* at 15 & n.13; *UP&L*, 897 F.2d at 451-452; *Council of S. Mountains*, 751 F.2d at 1421. Thus, the Secretary's interpretation effectuates the "[g]reater miner participation" Congress deemed essential to the Act, *UP&L*, 897 F.2d at 451 n.2, and the court of appeals correctly deferred to the Secretary's protective construction of this safety legislation. *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980).

b. In contrast, petitioner's narrow construction of Section 103(f), under which only employees and their NLRA collective bargaining agents may serve as miners' representatives, would thwart the goals of the Mine Act. See *UP&L*, 897 F.2d at 456; *Magma Copper*, 645 F.2d at 698. Under the NLRA, Congress intended employees to exercise "full freedom of association [and] self-organization," 29 U.S.C. 151, by

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[4] Petitioner's reliance (Pet. 17) on an interpretive bulletin issued by the Secretary in 1978 is entirely misplaced. The bulletin is silent as to whether nonemployees may serve as miners' representatives. *UP&L*, 897 F.2d at 452. Moreover, while the bulletin recognizes (43 Fed. Reg. 17,548 (1978)) that miners familiar with the "day to day operations" of a mine can aid an inspection, third parties who "ha[ve] held virtually every job in a coal mine," such as certain UMWA employees who have become designated as miners' representatives, no doubt also possess such familiarity. *UP&L*, 897 F.2d at 451.

choosing a *single* majority representative for purposes of collective bargaining. *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944). Under petitioner's view, however, only those miners who have already exercised their rights under the NLRA may exercise their right to select a nonemployee walkaround representative under the Mine Act, "thereby creating distinctions between unionized and nonunionized miners that have no basis in the statute." Pet. App. 39. Indeed, under petitioner's view, even a majority of miners at a mine could not designate a walkaround representative if they had not previously designated that entity as their collective bargaining agent under the NLRA. The Mine Act's reliance on the ongoing participation of *all* miners in health and safety matters cannot be served by depriving them of a nonemployee representative unless and until a majority of them have exercised their rights in a particular way under another statute. See *Local 1976, United Bhd. of Carpenters & Joiners* v. *NLRB*, 357 U.S. 93, 110 (1958).

3. There is likewise no merit to petitioner's contention (Pet. 21) that because the Secretary has provided that "representatives" under the Occupational Safety and Health Act (OSH Act), 29 U.S.C. 651 *et seq.*, generally are to be employees, his different implementation of the Mine Act is unreasonable.[5]

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[5] Under the OSH Act, "a representative authorized by [an employer's] * * * employees" may accompany the Secretary or his authorized representative during a physical inspection of the workplace. 29 U.S.C. 657(e). Regulations provide that "[t]he representative(s) authorized by employees shall be an employee(s) of the employer," but also provide that a "third party who is not an employee of the employer (such as an industrial hygienist or a safety engineer)" can participate in

Although the Mine Act parallels the OSH Act in certain respects, Congress's "intense concern" with conditions in the mines led it to enact "a sharply focused statute" directed at a single industry, as opposed to the OSH Act, which regulates "all types of safety and health hazards throughout American industry." *United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1232 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981); see *Dewey*, 452 U.S. at 603. Indeed, Congress recognized that mining is "so unique, so complex, and so hazardous as to not fit neatly under the [OSH] Act." *Dewey*, 452 U.S. at 603 n.8 (quoting H.R. Rep. No. 312, 95th Cong., 1st Sess. 1 (1977)).

Congress accordingly did not pattern the Mine Act solely on the OSH Act; it also "use[d] the stronger features of the Coal Act [Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 742] as the foundation for a new and comprehensive mine safety and health law which is applicable to the entire mining industry." 123 Cong. Rec. 4387 (1977) (Sen. Williams). Significantly, one such feature of the predecessor Coal Act was the authorization of nonemployee miners' representatives. Section 103(h) of the Coal Act provided that "the authorized representative of the miners at the mine * * * shall be

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the inspection upon a showing of "good cause" that such participation "is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace." 29 C.F.R. 1903.8(c). Petitioner points to no authority that prohibits the making of such a showing to justify participation by a union at a nonunion workplace. Cf. *In re Establishment Inspection of Caterpillar, Inc.*, No. 94-3453 (7th Cir. May 25, 1995) (striking employee may be walkaround representative under OSH Act; inspector's authority and OSH Act procedures adequately guard against abuse).

given an opportunity to accompany the authorized representative of the Secretary on [an] inspection." 83 Stat. 750. Congress intended "representative" under the Coal Act to include "any individual or organization that represents any group of miners at a given mine," without regard to whether the representative was "recognized * * * under other labor laws." Pet. App. 13 n.10 (quoting H.R. Conf. Rep. No. 761, 91st Cong., 1st Sess. 67 (1969)). The applicable regulation, 30 C.F.R. 81.1(b) (1976), similarly provided that a representative "means any person or organization which represents two or more miners at a coal mine for purpose[s] of the Act." Against this background, it clearly was reasonable for the Secretary, in determining the range of representation available to miners, to follow the Coal Act, upon which the Mine Act was more directly modeled in these respects, while striking a somewhat different balance in implementing the OSH Act.

4. Petitioner insists (Pet. 15) that under Section 103(f), miners may designate only those representatives who have "*the* purpose," and no other, of aiding the inspection. Petitioner's would-be exclusion of so-called "'mixed motive' representatives" (Pet. 15), however, falls wide of the mark. Anyone—including employees and collective bargaining agents—may have additional motives in serving as a walkaround representative. The Secretary's focus on "the actual conduct of the miners' representative during the inspection," Pet. App. 39, far better effectuates the Act's purposes than would a regime requiring the Secretary to police the varied (and presumably lawful) motives of each and every walkaround representative.

As the court below reasoned (Pet. App. 15), motives are "irrelevant" as long as the representative "does

not abuse its designation and serves the objectives of the Act." The Act's "predictable and guided * * * regulatory" scheme already provides a "specific mechanism" for accommodating a mine owner's particular concerns regarding an inspection. *Dewey*, 452 U.S. at 604-605; *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F.2d 589, 594 (3d Cir. 1979) (protecting against disclosure of trade secrets), cert. denied, 444 U.S. 1015 (1980).[6] The Secretary's representative, who retains control over the mine inspection at all times, can prevent misconduct of whatever kind by directing the miners' representative to leave. See Pet. App. 59. There accordingly is no reason why "such [hypothetical] abuse * * * cannot be remedied on an individual basis under the Mine Act." *Thunder Basin*, 114 S. Ct. at 781; *UP&L*, 897 F.2d at 452; see Pet. App. 15. The mere potential for abuse is no reason to engraft a "drastic limitation" from another statute onto the Act, *Hercules, Inc.* v. *EPA*, 938 F.2d 276, 280-281 (D.C. Cir. 1991)—especially since designation of expert nonemployee representatives furthers the goal of miner participation, Pet. App. 15 & n.13, and thereby furthers the Secretary's enforcement of the Act. *United Mine Workers*, 671 F.2d at 626.

5. The court below correctly rejected petitioner's reliance (Pet. 12-15) on *Lechmere, Inc.* v. *NLRB*, 502

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[6] As in *Thunder Basin*, there is no evidence that the UMWA or its employees ever accompanied the Secretary's representative on an inspection of petitioner's mine. Because representatives cannot receive advance notice of the Act's mandatory inspections, "the ability of the nonemployee UMWA designees to exercise these limited walk-around rights is speculative." 114 S. Ct. at 781.

U.S. 527 (1992). In that case, the Court "clarif[ied] the relationship between the rights of employees under § 7 of the [NLRA] * * * and the property rights of their employers." *Id.* at 529. The Court emphasized that Section 7 of the NLRA, 29 U.S.C. 157, confers rights only on employees, not on labor organizations, and it reiterated the general rule of *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), that an employer may prohibit "nonemployee distribution of union literature" on its property, unless the employees, because of where they live or work, are "beyond the reach of reasonable union efforts to communicate with them." *Lechmere*, 502 U.S. at 538-539 (quoting *Babcock & Wilcox*, 351 U.S. at 112, 113 (emphasis omitted)).

Lechmere has no application to the Mine Act. As the court below noted, in contrast to the NLRA, which confers no rights on employee representatives, the Mine Act "defines [their] rights * * * and specifies the level of intrusion on private property interests necessary to advance the safety objectives of the Act." Pet. App. 17; see *Thunder Basin*, 114 S. Ct. at 781 (Act does not confer "uncontrolled access right to the mine property to engage in any activity that the miners' representative wants"). By the same token, the Mine Act's pervasive regulatory scheme entails a generally diminished expectation of privacy on the part of mine operators. *Dewey*, 452 U.S. at 599-600; see also *Thunder Basin*, 114 S. Ct. at 781 n.21 ("Congress' interest in regulating the mining industry may justify limiting the private property interests of mine operators"); Pet. App. 18 n.16. As a result, there is no basis for petitioner's claim (Pet. 13) that the balance struck in *Lechmere* between employers' property rights and union organizers'

access rights precludes access here by miners' representatives who do not represent miners for NLRA purposes but who have been selected by miners to exercise their distinct walkaround rights under the Mine Act. Congress struck a different balance in the Mine Act that accommodates the interests of all miners, in union and nonunion mines alike, to be represented by persons of their choosing during enforcement inspections and proceedings. Pet. App. 3-4.

Because Section 103(f) of the Mine Act has no relation to the NLRA, there is no merit to petitioner's suggestion (Pet. 22) that the Court should hold the petition in this case pending a decision in *NLRB* v. *Town & Country Elec., Inc.*, cert. granted, 115 S. Ct. 933 (1995). The determination in that case of who is an *employee* under the NLRA entitled to Section 7's protections cannot resolve the entirely distinct question whether the Mine Act authorizes *nonemployees* to become miners' representatives.

6. Despite petitioner's belated attempt to raise the specter of a constitutional question in this case (Pet. 18-22), no such question is presented for the Court's review. As Judge Sentelle emphasized in his concurring opinion below (Pet. App. 20-21), petitioner failed to raise any constitutional challenge in the court of appeals, and the court did not decide the constitutionality of the walkaround right at issue in the case. Therefore, the issue is waived. *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981). Petitioner's bare assertion that a constitutional issue implicating the Takings Clause "lurk[s]" in this case (Pet. 19 (quoting Pet. App. 20)) cannot suffice to place such an issue before the Court. See *Aircraft &*

Diesel Equip. Corp. v. *Hirsch*, 331 U.S. 752, 763 (1947); see also *Pennell* v. *City of San Jose*, 485 U.S. 1, 10 (1988); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-295 (1981).

In any event, the Takings Clause does not advance petitioner's case. That constitutional provision requires the government to provide compensation where it has effected a "taking" of private property, either through physical appropriation or occupation, or by depriving the owner of the economically viable use or value of the property through regulation that imposes a burden on the property owner that "should be borne by the public as a whole." *Yee*, 503 U.S. at 523; see, *e.g.*, *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2316 (1994); *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2893-2895 (1992); *Virginia Surface Mining*, 452 U.S. at 295-296. Permitting third parties to accompany a mine inspector during inspections of the mine for law enforcement purposes, however, does not amount to a physical occupation for which compensation is due.[7]

Petitioner does not challenge the Mine Act's authorization for MSHA inspectors to enter the premises, and this Court has held that it is

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[7] Unlike the statutory measures at issue in the takings cases on which petitioner relies, the Mine Act does not confer on the public—or on nonemployee miners' representatives—a "continuous right to pass to and fro * * * even though no particular individual is permitted to station himself permanently upon the premises." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 832 (1987) (public easement across residential property); see *Dolan* v. *City of Tigard*, *supra* (dedication of portion of commercial property as bicycle pathway easement); *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) (public access to dredged lagoon).

"reasonable" within the meaning of the Fourth Amendment for them to do so even without a warrant, in view of the dangerous and pervasively regulated nature of mining. See *Dewey*, 452 U.S. at 602-604. A mine operator can therefore have no reasonable investment-backed expectation that it may prevent inspections of its property. Cf. *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2291-2292 (1993). The incremental intrusion on the mine operator's property interests that would result from the presence of a miners' representative along with the inspector is negligible. As the court below pointed out in rejecting petitioner's reliance on *Lechmere*, the Mine Act "does not convey an uncontrolled access right to the mine property to engage in any activity that the miners' representative wants." Pet. App. 17 (quoting *Thunder Basin*, 114 S. Ct. at 781). The Mine Act represents Congress's accommodation, in this pervasively regulated and notoriously dangerous industry, between the property rights of mine operators and the access rights of third parties. *Thunder Basin*, 114 S. Ct. at 781 n.21; *Dewey*, 452 U.S. at 603; Pet. App. 17-18. Whatever limited incursion this regulatory scheme might work from time to time on a mine operator's asserted right to exclude others from its property (see Pet. 20), there can be no claim that Section 103(f) "has unfairly singled out" petitioner to bear a burden that should be shared by the public, *Yee*, 503 U.S. at 523, or that the Act "prevent[s] beneficial use of coal-bearing lands," *Virginia Surface Mining*, 452 U.S. at 296.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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